



# STATE OF INDIANA

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November 27, 2012

Rocky M. Shroyer  
DOC 956193  
5501 South 1100 West  
Westville, Indiana 46391

*Re: Formal Complaint 12-FC-338; Alleged Violation of the Access to Public Records Act by the Indiana Department of Corrections*

Dear Mr. Shroyer:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Corrections ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John Schrader, Litigation Liason, responded in writing on behalf of the Department. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on October 9, 2012, you submitted a written request for records to the Department for all records reflecting the factual basis for any disciplinary action in which formal action has been taken that resulted in the suspension, demotion or discharge of three specific Department employees. You provide that the information requested falls within I.C. § 5-14-3-4(b)(8)(A)-(C). On October 12, 2012, Mr. Schrader denied your request in writing stating that "personnel files are excepted from disclosure under I.C. § 5-14-3-4(a) and (b)." You provide that this information is not personal in nature and does not concern or affect the security of a penal institution.

In response to your formal complaint, Mr. Schrader advised that your request was denied pursuant to I.C. § 5-14-3-4(b)(23). Under the APRA, you are considered an "offender." As a result, your access to records is subject to further restrictions. In light of the serious safety and confidentiality concerns associated with allowing offenders to have access to personal information related to Department staff, the Department will not provide offenders with such information. The Department goes to great lengths to keep the relationship between correctional staff and offender population at a professional level. The more information known to offenders regarding Department employees, the less safe the correctional facility will be. While the records may not have such detrimental

impacts for the general public, such records in a correctional facility may well put the lives of the Department staff in danger.

## ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA’s disclosure requirements, except for:

- “(A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee’s representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request

being particularized by employee name.” I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file.

Here, the Department denied your specific written request for records found under I.C. § 5-14-3-4(b)(8)(C) in writing pursuant to I.C. § 5-14-3-4(b)(23). There is no dispute that you are currently confined in a penal institution. As such, you are an “offender” for the purposes of the APRA. *See* I.C. § 5-14-3-2(i). The APRA contains an exception to disclosure to an “offender” for a record that contains information that would concern or affect the security of a jail or correctional facility:

Records requested by an offender that:

(A) contain personal information relating to:

- (i) a correctional officer (as defined in IC 5-10-10-1.5);
  - (ii) a law enforcement officer (as defined in IC 35-31.5-2-185).
  - (iii) a judge (as defined in IC 33-38-12-3);
  - (iv) the victim of a crime; or
  - (iii) a family member of a correctional officer, law enforcement officer, judge, or the victim of a crime;
- or

(B) concern or could affect the security of a jail or correctional facility. I.C. § 5-14-3-4(b)(23).

On two prior occasions the Public Access Counselor’s office has addressed the intersection of I.C. § 5-14-3-4(b)(8) and I.C. § 5-14-3-4(b)(23) and alternatively, I.C. § 5-14-3-4(b)(10).<sup>1</sup> *See Opinions of the Public Access Counselor 07-FC-34 and 08-FC-201*. In both opinions, Counselor’s Davis and Neal opined that the correctional facility was required to provide the requested information found under I.C. § 5-14-3-4(b)(8)(A)-(C) in response to a specific request submitted by an offender. Counselor Neal provided:

“Here, the information you requested falls under the mandatory disclosure provisions of I.C. § 5-14-3-4(b)(8). While the Facility is afforded discretion under I.C. § 5-14-3-4(b)(23) to withhold from disclosure certain personal information that concerns or could affect the security of the Facility, it is my opinion that exception to disclosure does not override the mandatory disclosure provisions of I.C. § 5-14-3-4(b)(8).

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<sup>1</sup> I.C. § 5-14-3-4(b)(10) provides that administrative or technical information that would jeopardize a record keeping or security system shall be excepted from disclosure at the discretion of the agency.

Former Counselor Karen Davis addressed a similar issue in *Opinion of the Public Access Counselor 07-FC-34*. In that opinion, Counselor Davis referred to I.C. § 5-14-3-4(c), which provides the following:

Nothing contained in subsection (b) shall limit or affect the right of a person to inspect and copy a public record required or directed to be made by any statute or by any rule of a public agency.

In *Opinion 07-FC-34*, Counselor Davis suggested that subsection 4(b)(8) “trumps” subsection (4)(b)(10). I do not agree with the analysis, but I agree with the conclusion. In my opinion, subsection 4(b)(8) does not require or direct certain records to be made, as contemplated by subsection 4(c). In my opinion, though, subsection 4(b)(8) provides a clear mandate that certain records, if they are maintained by the public agency, must be disclosed upon request. Because these records are a specific exception to the general exception to disclosure for personnel records, it is my opinion that another discretionary exception contained in subsection 4(b) cannot trump the mandate for disclosure. In other words, it is my opinion the new subsection, I.C. § 5-14-3-4(b)(23), provides that an agency may exercise its discretion to withhold records under the provision so long as those records are not required by another statute to be disclosed.” *Opinion of the Public Access Counselor 08-FC-201*.

Based on the opinions of Counselor Davis and Neal, it is my opinion that as the statute currently reads, the Department may not deny your specific request for information found under I.C. § 5-14-3-4(b)(8)(A)-(C) pursuant to I.C. § 5-14-3-4(b)(23). Had your request been for “all employees of the Department”, the Department would have been able to deny your request pursuant to I.C. § 5-14-3-4(b)(8), as you would have sought information generally on all employees without listing any employee’s name. *See Opinions of the Public Access Counselor 04-FC-98 and 10-FC-61*. In addition to the analysis provided by Counselor Davis and Neal, I would note that the General Assembly has provided in several instances in which certain agencies are not required to comply with the required disclosures found under I.C. § 5-14-3-4(b)(8) (e.g. I.C. §§ 5-14-3-4(b)(22); I.C. 5-14-3-4.3), however, there is no such limiting language contained (b)(23).<sup>2</sup>

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<sup>2</sup> If, for example, (b)(23) provided “Notwithstanding subdivision (8)(A)-(C), records requested by an offender. . .” or “Records requested by an offender that (A) contain personal information found in (8)(A)-(C) relating to . . .”, then it would be my opinion that the Department would be able to deny the request at issue here.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Department may not deny your request for information found under I.C. § 5-14-3-4(b)(8)(A)-(C) pursuant to I.C. § 5-14-3-4(b)(23).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: John Schrader